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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1978

**No. 77-1810**

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC  
COMPANY, SALT RIVER PROJECT AGRICULTURAL IM-  
PROVEMENT AND POWER DISTRICT, SOUTHERN CALI-  
FORNIA EDISON COMPANY, and TUCSON GAS & ELEC-  
TRIC COMPANY, *Appellants*,

v.

ARTHUR B. SNEAD, Director of the Revenue Division of  
the Taxation and Revenue Department, REVENUE  
DIVISION OF THE TAXATION AND REVENUE DEPART-  
MENT, and STATE OF NEW MEXICO, *Appellees*.

On Appeal From The Supreme Court of New Mexico

**BRIEF FOR THE APPELLANTS**

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MENT, and STATE OF NEW MEXICO, *Appellees*.<sup>1</sup>

On Appeal From The Supreme Court of New Mexico

**BRIEF FOR THE APPELLANTS**

**OPINIONS BELOW**

The Opinion of the Supreme Court of New Mexico is reported at 91 N.M. 485, 576 P.2d 291, and was

<sup>1</sup> Appellees in the New Mexico Supreme Court, in addition to the State of New Mexico, were the Bureau of Revenue and its Commissioner, Mr. Fred O'Chesky. By New Mexico Laws 1977, Chapter 249 (effective March 31, 1978), the Bureau of Revenue was abolished and the Electrical Energy Tax Act was amended to define

printed as Appendix B to the Jurisdictional Statement. The Memorandum Opinion of the District Court of the First Judicial District, Santa Fe County, New Mexico, is not reported and was printed as Appendix A to the Jurisdictional Statement. No other written opinions have been delivered.

### **JURISDICTION**

The opinion of the Supreme Court of New Mexico was issued and filed on March 23, 1978 (App. 3, 147). No petition for rehearing was submitted. A Notice of Appeal was filed in the Supreme Court of New Mexico on April 12, 1978 (App. 3, 148), and the Jurisdictional Statement was filed in this Court on June 21, 1978. The appeal was docketed on that date, and this Court noted probable jurisdiction on October 10, 1978. The jurisdiction of this Court rests upon 28 U.S.C. § 1257(2).

### **CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED**

The pertinent provisions of the United States Constitution involved are set forth in Appendix I. The text of the New Mexico Electrical Energy Tax Act is set forth in Appendix II. The full text of Section 2121(a) of the Tax Reform Act of 1976, 90 Stat. 1914, 15 U.S.C. § 391, is as follows:

No State, or political subdivision thereof, may impose or assess a tax on or with respect to the

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"Bureau" as the Revenue Division of the Taxation and Revenue Department. The Revenue Division and its Director, Mr. Arthur B. Snead, have succeeded to the functions of the Bureau of Revenue and Mr. O'Chesky, respectively, and have been substituted as parties here, pursuant to Rule 48(3), Rules of the Supreme Court.

generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section, a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

### **QUESTIONS PRESENTED**

The following questions are presented by this appeal:

1. Is the New Mexico Electrical Energy Tax Act, which effectively applies only to electricity generated in New Mexico and transmitted to other states for sale and consumption, discriminatory within the meaning of § 2121(a) of the Tax Reform Act of 1976?
2. May a state, consistently with the limitations imposed by the Commerce Clause, impose a tax which burdens only electricity generated within that state and transmitted to other states for sale and consumption?
3. Does a state tax, the clear purpose and effect of which is to collect revenue solely from citizens of other states, violate the Commerce Clause and the Due Process Clause of the Fourteenth Amendment?
4. Is it a violation of the Import-Export Clause for a state to impose a tax whose economic incidence is on electricity transmitted for sale and consumption in a foreign nation?

### STATEMENT OF THE CASE

This is an action commenced by appellants in the District Court of the First Judicial District, Santa Fe County, New Mexico, seeking a judgment declaring the provisions of New Mexico's Electrical Energy Tax Act, Chapter 263, Laws 1975 (Appendix II) to be unconstitutional and void by reason of the provisions of Article I, Section 8, cl. 3, Article 1, Section 10, Article IV, Section 2, cl. 1, and Amendment XIV of the Constitution of the United States, and by reason of the provisions of Section 2121(a) of the Tax Reform Act of 1976, 90 Stat. 1914, 15 U.S.C. § 391 (App. 4, 9-17, 91-100). The decision of the Supreme Court of New Mexico was in favor of the validity of the Electrical Energy Tax Act (App. 3, 147).

Appellants Arizona Public Service Company (hereinafter "APS"), El Paso Electric Company (hereinafter "EPE"), Salt River Project Agricultural Improvement and Power District (hereinafter "SRP"), Southern California Edison Company (hereinafter "SCE"), and Tucson Gas & Electric Company (hereinafter "TGE") are public utility companies whose service areas encompass the major population centers of El Paso, Texas; Tucson and Phoenix, Arizona; and Southern California (excluding the City of Los Angeles); and their environs (App. 33, 41, 52-53, 58-59, 65-66). EPE also provides retail electric service in an area in south central New Mexico, and is the only appellant regulated as a public utility by the State of New Mexico (App. 41, 43, 91, 111).

Portions of the electricity required to serve these areas, which include an aggregate population in excess of 10 million people, is produced at generation facilities located within the boundaries of the State

of New Mexico (App. 33, 41, 53, 59, 66). Each plaintiff owns an undivided interest in the Four Corners Power Plant located in northwestern New Mexico on the Navajo Indian reservation (App. 33). TGE is an equal co-owner with another utility, Public Service Company, of New Mexico, of units of the San Juan Generating Station, also located in northwestern New Mexico (App. 66). EPE, in addition to its interest in the Four Corners plant, also owns and operates the Rio Grande Generating Station near Anapra, New Mexico (App. 41).

Electrical energy is generated at each of these facilities in response to demands for power in appellants' service areas (App. 35). This electricity is first delivered through a switchyard, to transformers which increase its voltage to a level required for transmission. This high voltage energy is then allocated by switchyard facilities to transmission lines which carry it to the particular service area where it is to be consumed. Until the generated energy is transformed and allocated in this fashion, the particular market in which it will be distributed cannot be identified (App. 34-37, 42-43, 53-55, 60-61, 67-68). The transmission systems of the appellants are inter-connected with each other and with the systems of other electric utilities and the United States Bureau of Reclamation, forming an interstate grid encompassing the entire western United States and portions of Canada and Mexico (App. 34, 42, 53, 59-60, 66-67).

Certain amounts of the power generated at appellants' New Mexico facilities is initially sold, at the wholesale level, to other utilities for subsequent resale. Appellants have engaged in such wholesale transactions both with each other and with other utilities, including Public Service Company of New Mexico (App.

20-23, 38, 44, 48, 50, 55, 61, 68). Each has entered into a "Six Party Economy Energy Agreement," which provides for voluntary sales of energy among the parties thereto under stated circumstances, as well as "Principles of Interconnected Operation" and a "Unit Tripping Agreement," which provides for such sales as an emergency service (App. 37, 43-44, 55, 61, 68). In addition, there are in existence individual contracts between APS and TGE, and between APS and Public Service Company of New Mexico, for wholesale power sales (App. 37). The balance of the energy generated in New Mexico by the appellant utilities is sold at the retail level, for immediate consumption. The vast majority of these retail sales are made after the electricity has been transmitted to the appellants' service areas in other states (App. 23-27).<sup>2</sup>

Each of the utilities has paid and continues to pay taxes imposed by New Mexico (Apportioned Corporate Income, Ad Valorem, Corporate Franchise, Compensating Unemployment, and Excise) in the same manner that wholly intrastate New Mexico utilities pay such taxes (App. 34, 41, 53, 59, 66). In addition, each pays a variety of local and/or state taxes in the state in which the electricity generated at the New Mexico facilities described above is ultimately consumed (App. 39, 45, 56, 63, 69, 78-83).

The New Mexico Electrical Energy Tax Act (hereinafter "the Energy Tax" or "the Act") became effective on July 1, 1975. (The full text of the Act is set forth in Appendix II.) For present purposes, the per-

<sup>2</sup> APS has made some minor retail sales of electricity in New Mexico, and EPE engages in retail sales of power in that portion of its service area which is located in southern New Mexico.

tinent provisions of the Act are Sections 3 and 9, which provide:

Section 3 (§ 72-34-3, NMSA 1953 (1975 P.S.)):

A. For the privilege of generating electricity in this state for the purpose of sale, whether the sale takes place in this state or outside this state, there is imposed on any person generating electricity a temporary tax, applicable until July 1, 1984, of four-tenths of one mill (\$.004) on each net kilowatt hour of electricity generated in New Mexico.

\* \* \*

Section 9 (§ 72-16A-16.1, NMSA 1953 (1975 P.S.)):

A. If on electricity generated outside this state and consumed in this state, an electrical energy tax or similar tax on such generation has been levied by another state or political subdivisions thereof, the amount of such tax paid may be credited against the gross receipts tax due this state.

B. On electricity generated inside this state and consumed in this state which was subject to the electrical energy tax, the amount of such tax paid may be credited against the gross receipts tax due this state.

C. The credit under Subsections A or B of this section shall be assigned to the person selling the electricity for consumption in New Mexico on which New Mexico gross receipts tax is due, and the assignee shall reimburse the assignor for the credit.

Section 3(A) of the Act, § 72-34-3(A), NMSA 1953 (1975 P.S.), purports to impose upon "the privilege of generating electricity in this state for the purpose of sale," a tax of four-tenths of one mill for each net kilowatt hour of electricity generated in New Mexico.

This levy's apparent effect is blunted, however, by the "credit" provisions contained in Section 9, § 72-16A-16.1, NMSA 1953 (1975 P.S.). Section 9(B) permits the generator to take a credit, against the New Mexico Gross Receipts Tax, § 72-16A-1, *et seq.*, NMSA 1953, in the amount of any Electrical Energy Tax paid with respect to electricity *generated and consumed in New Mexico* (App. 112). No similar credit is available for electricity generated in New Mexico but consumed in other states (App. 38, 44-45, 55-56, 61-62, 68-69).

Much of the electricity generated in New Mexico, both by appellants and others, is initially sold in a wholesale transaction for resale at the retail level. The New Mexico Gross Receipts Tax does not apply to such wholesale transactions. Under ordinary circumstances, a generator-wholesaler would not be in a position to invoke the credit provisions of Section 9(B), for that generator would incur no gross receipts tax liability against which to credit the amount of Energy Tax imposed.

Section 9(c) accommodates this situation by requiring the wholesaler to assign the credit arising from assessment of the Energy Tax to the retailer, who may apply it against the Gross Receipts Tax.<sup>3</sup> The section also requires the retailer marketing the electricity *for consumption in New Mexico* to reimburse the wholesaler in an amount equal to the credit against the Gross Receipts Tax which the retailer actually receives (Appendix 112).

<sup>3</sup> At this stage of distribution, no actual credit arises, as the Gross Receipts Tax is inapplicable to wholesale transactions. Bureau of Revenue regulations (Appendix III) refer to the wholesaler's acquiring a "potential" credit, which is assigned to the retailer. See note 12, *infra*, and accompanying text.

This credit assignment-reimbursement mechanism insures that the generator-wholesaler, who is not subject to the Gross Receipts Tax and would ordinarily receive no benefit from the Section 9(B) credit, will incur no greater tax liability for locally consumer energy (App. 38, 44-45, 55-56, 61-62, 68-69). Throughout the course of this litigation, it has been undisputed that, by operation of the credit provisions of Sections 9(B) and (C), the Energy Tax will impose no additional tax liability upon electricity which is generated and consumed in New Mexico.

Again, Section 9(C) is wholly inapplicable if the wholesaled energy is resold for consumption in another state. Throughout the course of this litigation, it has been undisputed that, by operation of the credit provisions of Sections 9(B) and (C), the Energy Tax will impose no additional tax liability upon electricity which is generated and consumed in New Mexico.

This action was commenced in the District Court of Santa Fe County on September 18, 1975, with the filing of a Complaint seeking a declaratory judgment that the Act was void and unconstitutional by reason of the provisions of Article I, Section 8, cl. 3, Article I, Section 10, Article IV, Section 2, cl. 1 of the Constitution of the United States, and of the due process and equal protection clauses of Amendment XIV to that Constitution (App. 3, 9-17). Subsequent to filing the action, each appellant submitted to the New Mexico Bureau of Revenue a return showing the following amounts of electricity generated by each in New Mexico in July, 1975, and the amount of Energy Tax applicable to that generation which would not be forgiven by the Act's credit provisions (App. 38-39, 45, 56, 62, 69):

Appellant	Amount of Generation (KWH)	Amount of Tax
APS	417,874,000	\$167,149.60
EPE	94,720,752 *	37,806.70
SRP	48,145,000	19,258.00
SCE	231,003,000	92,401.20
TGE	145,206,000	58,082.40

An initial Motion for Summary Judgment was filed by appellants on September 15, 1976 (App. 6, 30). Following passage of the Tax Reform Act of 1976, appellants filed an Amended Complaint, alleging the Act to be void and unconstitutional by reason of the provisions of Article VI, cl. 2 of the Constitution (App. 6, 91-100). A Supplemental Motion for Summary Judgment was thereafter submitted (App. 6, 102). The State responded with a similar Motion for Summary Judgment and the matter was heard by the District Court in due course (App. 7, 115). Following the issuance of its Memorandum Opinion, the District Court entered Judgment, on February 18, 1977, denying appellants' Motion for Summary Judgment and Supplemental Motion for Summary Judgment, and granting the State's Motion for Summary Judgment (App. 7, 142-44).

An appeal was duly taken to the Supreme Court of New Mexico (App. 7, 145). On March 23, 1978, the New Mexico Supreme Court issued its Opinion, affirm-

\* This is a net Energy Tax figure for EPE. EPE's form EE-1 showed that, for July 1975, it had generated 155,314,000 KWH in New Mexico, giving rise to a potential Energy Tax liability of \$62,126.00. Because it markets electricity at retail in New Mexico, however, EPE was able to claim a credit, under Section 9(B), of \$24,237.30, so that its actual Energy Tax liability was \$37,806.70, as shown (App. 45).

ing the judgment of the District Court and sustaining the validity of the Energy Tax (App. 3, 147). In its opinion, the New Mexico Supreme Court concluded that the Electrical Energy Tax Act was not a discriminatory tax as defined in the Tax Reform Act. With respect to the constitutional issues, the lower court held that New Mexico's tax structure as a whole did not discriminate against the interstate transmission and sale of electricity and that the Energy Tax was on the generation of electricity, a local event not subject to multiple taxation by other states. The other claimed constitutional infirmities of the Energy Tax were not discussed.

#### SUMMARY OF ARGUMENT

New Mexico's Electrical Energy Tax Act is essentially a "domestic export tax" applicable *only* to goods (here, electricity) produced within New Mexico and transported to other states for sale and consumption. It is unconstitutional and void for any one of several reasons:

1. Exercising its delegated power to regulate matters affecting interstate commerce, the United States Congress enacted § 2121(a) of the Tax Reform Act of 1976, which forbids the imposition by the states of any tax "on or with respect to the generation of electricity" which "results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce" than on locally-consumed energy, 15 U.S.C. § 391. This legislation invalidates, through operation of the Supremacy Clause, any single state tax which falls within this statutory test for discrimination. The Energy Tax clearly satisfies that description. Indeed, the Tax Reform Act's legislative history makes clear that the provision in ques-

tion was prompted in part by the Energy Tax, and intended to invalidate at least that particular tax.

While Section 3 of the Energy Tax purports to reach all electricity generated in New Mexico for the purpose of sale, its actual scope is much more narrowly confined. The credit provisions of the Act, Sections 9(B) and (C), provide that the Energy Tax may be credited against any Gross Receipts Tax liability incurred at the retail level, and require retailers to reimburse generators not subject to the Gross Receipts Tax the amount of any credit received. These credit provisions apply *only* if the electricity is consumed in New Mexico, and effectively insure that the burden of the Energy Tax will *never* be imposed upon electricity generated in New Mexico which is locally consumed.

New Mexico has never disputed that the economic burden of the Energy Tax falls solely upon electricity transmitted in interstate commerce for consumption in other states. That is clearly the "greater tax burden" on such interstate transactions which the Tax Reform Act proscribes. Nevertheless, the lower court found the Tax Reform Act inapplicable, by assuming the presence in the statute of language which Congress never enacted in order to derive a test of discrimination which Congress never intended. Such a contrived process of statutory construction cannot save the Energy Tax.

2. While there has been increased refinement in recent years by this Court of the precise restrictions placed upon the states' taxing powers by the Commerce Clause, there has been no retreat from the cardinal principle that no state may impose a tax, however labeled or formulated, which discriminates against interstate commerce. The Energy Tax is a textbook example of such a discriminatory enactment.

Much of the electricity generated in New Mexico is initially marketed by a generator at the wholesale level to a retailer who will resell it to consumers. If the electricity sold in that wholesale transaction is destined to be consumed in New Mexico, the credit provisions of the Act grant the wholesale seller a mandatory reimbursement from the retailer which expunges any Energy Tax liability. The net effect is that wholesale sales of electricity for consumption in New Mexico suffer no tax burden whatsoever. Wholesale sales of energy which is sold at retail and consumed in other states, on the other hand, are subject to the Energy Tax.

This disparate treatment of wholesale transactions involving interstate commerce clearly violates the rule of "equal treatment for in-state and out-of-state taxpayers similarly situated" enunciated in *Halliburton Oil Well Cementing Co. v. Reilly*, 373 U.S. 64, 69-70 (1963). The patent discrimination in New Mexico's tax treatment of wholesale sales of electricity cannot be justified by improperly characterizing the Energy Tax as one on the local event of power generation. *Cf. Utah Power & Light Co. v. Pfof*, 286 U.S. 165 (1932). No case has ever sustained a state production or severance tax which applied only to goods shipped for consumption outside the taxing state; yet that is precisely what the Energy Tax does.

3. Because of its unique credit provisions, the actual economic incidence of the Energy Tax falls solely and entirely upon electricity generated in New Mexico which is eventually consumed, after transmission in interstate commerce, in other states. This same electricity which bears the exclusive burden of the Energy Tax becomes subject to significant additional taxation when it reaches the state where it is consumed. The

showing in the record of actual multiple taxation of electricity transmitted in interstate commerce for consumption in other states remains uncontroverted.

The resultant overburdening of interstate commerce clearly violates the Commerce Clause and cannot be justified by the fiction that the Energy Tax is merely a production tax on the local activity of power generation. In its practical operation, the incidence of the Energy Tax is determined entirely by events occurring subsequent to generation, and falls, not upon all electricity generated in New Mexico, but only upon that consumed in other states. The Energy Tax is simply not a production or severance tax, but one whose economic incidence is upon the transmission and consumption of electric energy.

4. An analysis of the economic burdens imposed by the Energy Tax reveals that its revenues derive exclusively from the sale of electricity to consumers in states other than New Mexico. Indeed, its legislative history confirms that the Energy Tax was conceived, designed, and principally defended as a measure that would collect revenues solely from consumers in other states, and was carefully tailored to avoid placing any tax burden whatsoever on the residents of New Mexico. The Energy Tax is a conscious attempt to project New Mexico's taxing power beyond its own borders, and exceeds restrictions which the Due Process and Commerce Clauses independently impose.

5. A portion of the electricity generated by appellants in New Mexico is eventually sold and consumed in the Republic of Mexico. The Energy Tax applies to such electricity and does so precisely because of its foreign destination. Where a state tax is imposed upon goods destined for foreign export, the Import-Export

Clause requires that the tax not impinge upon the federal government's ability to govern foreign commercial affairs and not promote interstate friction and rivalry. An enactment such as the Energy Tax which applies to goods precisely because of their foreign destination and subjects those goods to a discriminatory tax burden violates both requirements. To the extent the Energy Tax applies to electricity transmitted to and consumed in the Republic of Mexico, it represents an Impost or Duty forbidden by the Import-Export Clause.

## ARGUMENT

### I

#### IMPOSITION OF THE ELECTRICAL ENERGY TAX IS EXPRESSLY PROHIBITED BY THE TAX REFORM ACT.

This Court has consistently recognized that Article I, Section 8, cl. 3 of the Constitution (the "Commerce Clause") vests Congress with virtually plenary regulatory authority in matters affecting interstate commerce, *cf.*, *e.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964), including the power to define the permissible and the impermissible in state taxation of interstate businesses. *Cf.* 15 U.S.C. § 381; *Heublein, Inc. v. So. Carolina Tax Comm'n*, 409 U.S. 275 (1972). Once Congress has spoken, the Supremacy Clause (Article VI, cl. 2) requires the invalidation of any conflicting state enactment. *Cf. City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); *Hill v. Florida ex rel. Watson*, 325 U.S. 538 (1945).

During the pendency of this litigation, the United States Congress enacted the Tax Reform Act of 1976, which became law on October 4, 1976. Section 2121(a)

of that Act, codified at 15 U.S.C. § 391 (hereinafter “§ 391”), provides:<sup>5</sup>

No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

The Tax Reform Act expressly forbids the imposition by a state of any tax “on or with respect to the generation of electricity” which is “discriminatory.” A “discriminatory” tax is defined by and for the purposes of that statute as one which “results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce’ than on locally-consumed energy. The Energy Tax falls quite clearly within the scope of that definition.<sup>6</sup>

<sup>5</sup> Section 2121(b) of the Tax Reform Act, 90 Stat. 1914, provided that the prohibition contained in § 2121(a) was to take effect beginning June 30, 1974 (App. 106).

<sup>6</sup> In its Motion to Dismiss or Affirm (hereinafter “Motion”), the State has suggested that, if § 391 is found applicable to the Energy Tax, then it must be held unconstitutional. (Motion pp. 17-19.) The suggestion is untenable. Legislation such as § 391 has repeatedly been found within Congress’ delegated powers. Cf. *Heublein, Inc. v. So. Carolina Tax Comm’n*, *supra*; *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954). The State has never advanced any argument sufficient to satisfy its burden of rebutting the strong presumption of validity that attaches to an Act of Congress. Cf., e.g., *United States v. Nat’l Dairy Products*

It cannot be disputed that the Energy Tax is one “on or with respect to the generation of electricity. . . .” The discriminatory burden of the Energy Tax is equally apparent. As this Court observed in *Arizona v. New Mexico*, 425 U.S. 794 (1976):

The tax is nondiscriminatory on its face: it taxes all generation regardless of what is done with the electricity after generation. However, the 1975 Act provides a credit against gross receipts tax liability in the amount of the electrical energy tax paid for electricity consumed in New Mexico . . . The State of New Mexico concedes that the Arizona utilities will not be able to take advantage of the credit because their sales of electrical energy are outside the State . . . 425 U.S. at 794-95.

While Section 3 of the Energy Tax purports to impose a tax on all electricity generated in New Mexico for the purpose of sale, its actual economic impact is not so all-encompassing. Through operation of the credit provisions of Section 9 of the Act, the tax imposed by Section 3 will *never* be paid with respect to energy consumed in New Mexico. Indeed, regulations issued by the New Mexico Commissioner of Revenue expressly recognize that the tax is immediately offset by a potential credit. (The text of G. R. Regulations 16.1:1 is set forth in Appendix III.)

*Corp.*, 372 U.S. 29 (1963); *Helvering v. Davis*, 301 U.S. 619 (1937); *United States v. Butler*, 297 U.S. 1 (1936). The fact that § 391 was intended to apply initially to a specific state statute is of no moment. In *Boston Stock Exchange v. State Tax Comm’n*, 429 U.S. 318 (1977), this Court noted, with no apparent constitutional concern, that the issues presented had been partially mooted by amendments to the Securities Exchange Act of 1934 that were “directed to New York’s transfer tax in particular . . .” 429 U.S. at 321, n. 4.

Section 9(B) wholly forgives any electrical energy tax which would be imposed upon electricity consumed in New Mexico, by allowing it to be credited against New Mexico's Gross Receipts Tax (§§ 72-16A-1, *et seq.*). This credit arises *only* when the electricity is sold at retail for consumption in New Mexico. No similar credit is provided for electricity generated in New Mexico but consumed in other markets.

Section 9(C) of the Act insures that the discrimination is complete. A wholesaler of electricity generated in New Mexico incurs no gross receipts tax liability against which the amount of Energy Tax due can be applied. The assigned credit and reimbursement device created by Section 9(C) will directly abate any electrical energy tax imposed on energy sold at wholesale for local consumption, leaving the burden of the tax to fall entirely upon utilities who sell at wholesale for consumption outside New Mexico.

The net effect of this statutory scheme is obvious. Electricity generated and ultimately consumed in New Mexico is not subject to the economic burdens of the Energy Tax, while electricity transmitted for consumption in other states is taxed. The Energy Tax clearly and undeniably imposes a "greater tax burden on electricity . . . generated and transmitted in interstate commerce" within the meaning of the Tax Reform Act.

In its Opinion, the lower court held that the Energy Tax imposed an "additional," but not a "greater" tax burden upon electricity transmitted for consumption in other states, so that the provisions of the Tax Reform Act were inapplicable. 576 P.2d at 294. The apparent reasoning that led to this conclusion is flawed in several respects.

Initially, the conclusion presupposes that the question whether a tax is discriminatory within the meaning of § 391 is to be resolved by examining "the *entire tax structure* of a state as applied to the *particular commodity* which is taxed . . ." 576 P.2d at 294 (emphasis in original).<sup>7</sup> Even assuming for the moment that this were the statutory test, the court's conclusion ignores the patent discrimination of New Mexico's tax structure against producers of electrical energy which is wholesaled for eventual consumption outside New Mexico, and effectively concedes that locally consumed energy bears none of the burden of the Energy Tax.

New Mexico's Gross Receipts Tax Act, §§ 72-16A-1, *et seq.*, NMSA 1953, applies with virtual uniformity to most *retail* sales of electricity in New Mexico, but does not apply at all to *wholesale* transactions. At the wholesale level, there is *no* New Mexico tax imposed on locally-consumed energy. The mandatory reimbursement for the "assigned credit" of § 9(C) will wholly erase any liability for the Energy Tax, and the Gross Receipts Tax is by its very terms inapplicable. On the other hand, the Energy Tax admittedly applies to energy sold at wholesale and transmitted in interstate commerce for consumption in other states.

More importantly, however, the reasoning of the New Mexico Supreme Court requires the addition to § 391 of critical language which Congress never enacted, in order to derive a test of discrimination which

<sup>7</sup> The further conclusion that New Mexico's total tax structure on electricity is nondiscriminatory derives from the notion that the total tax burden on locally consumed energy is the 4% Gross Receipts Tax, while the total tax burden on energy consumed outside New Mexico is only 2% (converting the Energy Tax to its appropriate Gross Receipts Tax Equivalent).

Congress never intended.<sup>8</sup> Nowhere in § 391 is there any reference to a state's "total tax structure" with respect to electricity generated within its borders. To the contrary, the statute addresses itself to "a tax on or with respect to the generation or transmission of electricity," and contemplates inquiry only with respect to the operative effect of the single particular state tax challenged as discriminatory. The language "or indirectly" in § 391 does not suggest any different test of discrimination; it merely indicates that Congress meant to forbid discriminatory burdens imposed through indirection, such as by the credit provisions of the Energy Tax.

In effect, the lower court's approach makes the unlikely and improper assumption that Congress, in enacting § 391, engaged in the essentially unnecessary exercise of codifying existing decisional law. Even assuming that cases such as *Gregg Dyeing Co. v. Query*, 286 U.S. 472 (1932), which considered a state's entire scheme of taxation in determining the existence of discrimination against interstate commerce, enunciate a viable constitutional precept, they are nevertheless inapposite here. Both the language of the Tax Reform Act and its legislative history establish Congressional

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<sup>8</sup> A similar disregard for the precise language enacted by Congress is evidenced in a separate argument that has in the past been advanced. Thus, the State has argued that § 391 reaches only discriminatory taxes on "electricity generated . . . in interstate commerce" and is inapplicable, because all electricity is generated in intrastate commerce. (Motion, p. 13.) That is simply not what the statute says. The statutory definition of a discriminatory tax refers to "electricity which is generated *and transmitted* in interstate commerce." 15 U.S.C. § 391 (emphasis added). The transmission of electricity for consumption outside New Mexico, which is the only activity effectively burdened by the Energy Tax, clearly occurs in interstate commerce. *Fed'l Power Comm'n v. Florida*

condemnation of any individual tax which applies only to, or imposes a heavier burden upon, energy transmitted outside the taxing state. The judicial rules developed to define the limitations on state power imposed by the Commerce Clause have been occasioned by the need to preserve the free flow of interstate trade in the face of Congressional silence. *A & P Tea Co. v. Cottrell*, 424 U.S. 366, 370-71 (1976). Such rules were never intended to apply to situations, such as the present one, where Congress has unequivocally spoken.

The language of the Tax Reform Act is clear and unambiguous. Section 319 speaks of "a tax on or with respect to the generation or transmission of electricity," *not all taxes* or the *total tax structure*. Congress enacted a statute which, by its terms, invalidates any single state tax which is in fact discriminatory. There is no exculpation based upon other aspects of the state's tax structure. Nor is there any basis, either in the language of the Tax Reform Act or its legislative history, for the lower court's implicit assumption that Congress was merely engaged in the essentially unnecessary exercise of reconfirming doctrine previously enunciated by this Court. Indeed, the legislative history convincingly shows that Congress specifically intended to reach and proscribe the Energy Tax.<sup>9</sup>

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*Power & Light Co.*, 404 U.S. 453 (1972). The point is that the Energy Tax can be saved only by adding to § 391 language which Congress never enacted, or by deleting language which was in fact passed.

<sup>9</sup> At the very most, the lower court's statutory analysis indicates a minor degree of ambiguity in the language of § 391. In the face of such ambiguity, it becomes the task of this Court to construe the statute in a fashion which best effectuates the intent of Congress:

The provision that was to become § 391 was added by the Senate Finance Committee to the version of the Tax Reform Act passed by the House of Representatives (H.R. 10612). In its explanation of this addition, the Report of the Finance Committee clearly describes the Energy Tax as an example of the type of state taxation to be forbidden:

*Reasons for change*

The committee has learned that one State places a discriminatory tax upon the production of electricity within its boundaries for consumption outside its boundaries. While the rate of the tax itself is identical for electricity that is ultimately consumed outside the State and electricity which is consumed inside the State, discrimination results because the State allows the amount of the tax to be credited against its gross receipts tax if the electricity is consumed within its boundaries. This credit normally benefits only domiciliaries of the taxing State since no credit is allowed for electricity produced within the State and consumed outside the State. As a result, the cost of the electricity to nondomiciliaries is normally increased by the cost the producer of the electricity must bear in paying the tax. However, the cost to domiciliaries of the taxing State does not include the amount of the tax.

The committee believes that this is an example of discriminatory State taxation which is properly within the ability of Congress to prohibit through its power to regulate interstate commerce.

S. Rep. No. 94-938-Part I, 94 Cong., 2d Sess. (1976) 437-38 (footnotes omitted), *reprinted in* [1976] U.S. Code Cong. & Admin. News, 3865-66 (App. 107-08).

In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress.

Almost immediately following the report of the Finance Committee bill to the Senate, Senator Domenici of New Mexico proposed an amendment to strike this new section in its entirety. During the course of floor debate on this "Domenici Amendment," it was made quite clear that the section, if retained, would invalidate the Energy Tax. *See*, 122 Cong. Rec. S. 12712, *et seq.* (daily ed. July 28, 1976). The proposed "Domenici Amendment" was soundly defeated, and the Senate enacted the provision without change.

The Conference Committee which considered and resolved the differences between the Senate and House versions of the Tax Reform Act incorporated the section on discriminatory taxation, but changed the words "higher gross or net tax" to "greater tax burden" without further explanation. The Conference Report expressly states that it is adopting the Senate amendment to H.R. 10612. H.R. Conf. Rep. No. 94-1515, 94th Cong., 2d Sess. (1976) 503, *reprinted in* [1976] U.S. Code Cong. & Admin. News 4206; S. Conf. Rep. No. 94-1236, 94th Cong., 2d Sess. (1976) 503 (App. 107). The Conference version was passed by both the House and Senate without further alteration.

As can be seen, 15 U.S.C. § 391 originated as a Senate amendment to the Tax Reform Act, which survived both Senate and House consideration substantively unscathed.<sup>10</sup> In his remarks during the debate on the

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*United States v. American Trucking Assoc., Inc.*, 310 U.S. 534 (1940). *Accord*, *United States v. Alpers*, 338 U.S. 680, 681-82 (1950); *United States v. Rosenblum Truck Lines*, 315 U.S. 50, 53 (1942). It was unquestionably the intent of Congress, in this instance, to prohibit imposition of New Mexico's tax.

<sup>10</sup> The State has previously suggested that § 391 did not become a part of the Tax Reform Act until that bill reached the House-

"Domenici Amendment," which would have stricken the provision in its entirety, Senator Fannin eloquently described the incipient national problem to which the provision was addressed:

Mr. President, we are not talking about only Arizona and New Mexico. We are talking about what could happen all over the United States. We are talking about a potential taxing war on the sale of power which could be devastating.

122 Cong. Rec. S12713 (daily ed. July 28, 1976). While the potential problem was of national concern, all who considered this measure, whether favorably or unfavorably, agreed that the need for the legislation had been occasioned by an initial actual manifestation of the problem, in the form of the Energy Tax. While the legislation was in part designed to prevent the enactment of similar taxes in other states, there has never been any doubt that its major purpose was to invalidate the Energy Tax.

The construction accorded § 391 by the opinion below disregards this legislative history and renders it essentially meaningless. The lower court's contrived reading of the statute leads to the anomalous and improper result of rendering a Congressional statute inapplicable to the very situation which precipitated its passage. This Court has consistently held that such a result is improper:

Where, as here, the language is susceptible of a construction which preserves the usefulness of the

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Senate Conference Committee, so that the Report of the Senate Finance Committee and the floor debate on the Domenici Amendment are irrelevant in determining Congressional intent. (Motion, pp. 14-15.) This curious conclusion proceeds from an erroneous premise. The legislative history discussed in this Brief is solely

section, the judicial duty rests upon this Court to give expression to the intendment of the law.

*Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 333 (1938).

The State has never seriously disputed that the statutory provision in question, as reported by the Finance Committee and passed by the Senate, was intended to invalidate the Energy Tax. (Motion, pp. 14, 15.) In attempting to escape the effect of the statute's legislative history, the State has consistently relied on a presumed transformation of Congressional intent, supposedly evidenced by a minor language substitution made by the Conference Committee. That Committee, as noted earlier, did change the words "higher gross or net tax" in the Senate version, to "greater tax burden," the formulation eventually enacted. There is certainly nothing in the language selected by the Conference Committee which signifies a departure from the meaning or intent of the Senate-passed bill. There are no legislative materials to support the State's claim of a radical alteration of legislative purpose. Quite to the contrary, the Report of the Conference Committee unequivocally states that its version "follows the Senate amendment" and presumably its intent as well. H.R. Conf. Rep. No. 94-1515, 94th Cong., 2d Sess. (1976) 503, *reprinted in* [1976] U.S. Code Cong. & Admin. News 4206; S. Conf. Rep. No. 94-1236, 94th Cong., 2d Sess. (1976) 503. (App. 107.)

The suggestion has also been made that the Energy Tax represents merely a reduction of New Mexico's

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that of the Tax Reform Act, and the provision that was to become § 391 was part of that bill well prior to the date of the Report of the Senate Finance Committee.

sales tax with respect to electricity and that Congress, in enacting § 391, did not intend to reach a simple recasting of New Mexico's tax structure. That is simply not, however, the legislation which New Mexico has enacted. This Court cannot rule on hypothetical taxes:

We can only consider the legislation that has been had, and determine whether or not its necessary operation results in an unjust discrimination between the parties charged with its burdens.

*Travelers' Ins. Co. v. Connecticut*, 185 U.S. 364, 371 (1902). *Cf. also McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 330 (1944); *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550, 563 (1935).

The clear and unambiguous wording of 15 U.S.C. § 391 encompasses the New Mexico Electrical Energy Tax Act and prohibits its assessment. The statute's legislative history makes it abundantly clear that it was intended to achieve that result. The New Mexico Supreme Court's treatment of this issue makes it apparent that the Energy Tax may be saved only by rewriting either the Energy Tax or the Tax Reform Act, or both. That is clearly impermissible, and the decision below should be reversed on that basis alone.

## II

### THE ENERGY TAX IMPERMISSIBLY DISCRIMINATES AGAINST INTERSTATE COMMERCE.

Although it is literally a grant of legislative power to the United States Congress, it is now established that the Commerce Clause (Article I, Section 8, cl. 3 of the Constitution), of its own force, acts as a restriction upon the taxing powers of the states, even where Congress has not spoken. *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977). Demarcation

by this Court of the precise boundaries of the limitations which the Commerce Clause imposes upon the taxing powers of the states has proceeded on a case-by-case basis and has always been a "troublesome area." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 275 (1977). Nevertheless, this Court has never questioned what is perhaps the most fundamental principle that has evolved:

No State may, consistent with the Commerce Clause, "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business."

*Boston Stock Exchange v. State Tax Comm'n*, *supra*, 429 U.S. at 329 (quoting *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959)). "The conclusion is inescapable: *equal treatment for in-state and out-of-state taxpayers similarly situated* is the condition precedent" for a valid state tax on interstate transactions. *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 69-70 (1963) (emphasis added); *cf. also Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940).<sup>11</sup> Appellants respectfully submit that the Energy Tax quite clearly exceeds this constitutional restriction.

The discriminatory nature of the Energy Tax becomes readily apparent when one compares New Mexico's tax treatment of wholesale transactions involving electricity both before and after its enactment. Prior to passage of the Energy Tax, wholesale transactions of both interstate and local character were treated in

<sup>11</sup> *Accord, Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U.S. 389, 391 (1952); *Interstate Oil Pipe Line Co. v. Stone*, 337 U.S. 662, 666 (1949); *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 366 (1941); *Gregg Dyeing Co. v. Query*, *supra*, 286 U.S. at 476.

equivalent fashion—neither transaction was subject to the New Mexico Gross Receipts Tax or any other tax. With passage of the Energy Tax, however, if a utility generating electricity in New Mexico sells that electricity at the wholesale level to an entity that transmits it to another state for consumption, no credit arises and the Energy Tax must be paid. If, on the other hand, that electricity is wholesaled to a distributor or retailer who markets it for consumption in New Mexico, the provisions of Sections 9(B) and (C) insure that no tax burden will be incurred. The effect of Section 9(C) is to require a private rebate of a tax credit which entirely relieves a company generating and wholesaling power for consumption in New Mexico from any additional tax liability.<sup>12</sup>

The only characteristic which distinguishes wholesale sales for local consumption, which remain free of any tax burden, and wholesale sales for out-of-state consumption, which are subject to the Energy Tax, is the fact that the latter involve interstate commerce. This Court recently reaffirmed the principle that a state may not permissibly distinguish, for purposes of taxation, between a local and an interstate transaction, nor between local transactions “on the basis of some

<sup>12</sup> The statutory terminology is somewhat fictionalized. If the tax statutes of New Mexico are straightforwardly applied, the wholesaler of electricity incurs no Gross Receipts Tax liability, and has nothing against which to apply its Section 9(B) credit. Strictly speaking, then, the wholesaler has no “credit” to assign to its retailer customer under Section 9(C). To deal with this problem, regulations issued by the Bureau of Revenue refer to the wholesaler as acquiring a “potential credit” must be assigned to the retailer, who can take an actual credit if the energy is in fact resold to New Mexico consumers (Appendix III). Quite obviously, the Act itself refers to no such “potential credit” concept.

interstate element.” *Boston Stock Exchange v. State Tax Comm’n*, *supra*, 429 U.S. at 332 n. 12. Even if both types of wholesale transactions are viewed as interstate in nature, the discrimination is nonetheless prohibited:

There has been no prior occasion expressly to address the question whether a State may tax in a manner that discriminates between two types of interstate transactions in order to favor local commercial interests over out-of-state businesses, but the clear import of our Commerce Clause cases is that such discrimination is constitutionally impermissible.

*Boston Stock Exchange*, 429 U.S. at 335.

There are other more subtle forms of discrimination involved as well. Because they transmit a greater portion of the electricity they generate in New Mexico for consumption in other markets than do local utilities, appellants will incur a far greater tax liability under the Energy Tax and will be placed at a competitive disadvantage in the wholesale market where they do compete with New Mexico-based utilities. A similar consequence can be anticipated at the retail level for EPE, which competes directly with local New Mexico utilities in uncertified areas in southern New Mexico (App. 51). It is clearly impermissible for a state to levy a tax which discriminates against interstate commerce “by providing a direct commercial advantage to local business . . . .” *Northwestern States Portland Cement Co. v. Minnesota*, *supra*, 358 U.S. at 458.

The discrimination of the Energy Tax against wholesale sales of power for eventual consumption in other states, however, is explicit. In *Halliburton Oil Well Cementing Co. v. Reily*, *supra*, this Court considered the application of a Louisiana use tax to specialized

oil well servicing equipment which was manufactured and assembled by the taxpayers in other states for use in Louisiana. In valuing this equipment for use tax purposes, Louisiana employed a method of computation that placed the taxpayers on the same footing as local companies who purchased the equipment at retail in Louisiana, but not with local entities who had purchased and assembled the equipment themselves. The Court enunciated the rule of "equal treatment for in-state and out-of-state taxpayers," 373 U.S. at 70, and held that Louisiana had used an invalid basis for comparison in applying it. As Halliburton was a "manufacturer-user," it had to be treated in the same fashion as would a local "manufacturer-user" rather than a local purchaser. In the present case, the appellants, interstate wholesalers, must be compared with local wholesalers and, when they are, the equality of treatment mandated by *Halliburton* is undisputably absent.

The opinion below simply ignores the undeniably discriminatory impact of the Energy Tax on wholesale transactions. That Court's observation that: "All producers *who retail their electricity* in New Mexico can take advantage of the credits provided in § 9," 576 P.2d at 295 (emphasis added), both makes and misses the point. The point missed is that the most invidious and direct discrimination of the Energy Tax occurs at the *wholesale* level, a circumstance which the lower court never even discusses. The point made is that the benefits of the credit provisions, which wholly expunge Energy Tax liability, are extended *only* to those whose transactions are localized within the State, leaving the entire burden of the Act to fall upon those engaged in interstate commerce. The Act's discriminatory impact cannot be justified by pretending it does not exist.

This discrimination against interstate transactions at the wholesale level cannot be masked or defended by characterizing the Energy Tax as one on the generation of electricity, which is said to be a separate local activity. The State has previously advanced this contention, relying principally upon *Utah Power & Light Co. v. Pfof*, 286 U.S. 165 (1932) (Motion, p. 8). Even assuming that the Energy Tax can be appropriately characterized as one upon the generation of electricity, that will not absolve its discriminatory features. As is discussed in greater detail in the succeeding section of this Brief (see pp. 36-37, *infra*), the *Pfof* decision, as well as other decisions of this Court concerning severance or production taxes, holds only that a production tax uniformly applied does not offend the Commerce Clause. That proposition is irrelevant here, where the tax is imposed *only* if the goods produced (electricity) are marketed and consumed outside New Mexico.

Perhaps in recognition of this difficulty, the State has also argued, and the lower court held, that the Energy Tax is in fact on the commodity of electricity and that inquiry must be made of New Mexico's total tax structure with respect to electricity to ascertain whether the Energy Tax is discriminatory. That inquiry is of no assistance to the State's position. Analysis of New Mexico's total tax structure reveals that a wholesale sale of electricity for local consumption is subject to no tax burden whatsoever, while a similar sale of electricity for consumption in other states is subject to the Energy Tax. That is clearly discriminatory and violates the rule of equal treatment announced in *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963).

This patent discrimination against interstate transactions at the wholesale level remains undisputed. As noted, the New Mexico Supreme Court simply ignored the issue. The State's only response has been that: "It is hard to see why special significance is attached to wholesale transactions." (Motion, p. 9.) The record, however, shows that the wholesaling of electricity is a separate and significant sphere of economic activity for appellants and their New Mexico utility competitors (App. 20-23, 38, 44, 48, 50, 55, 61, 68).<sup>13</sup> New Mexico simply cannot be heard to contend that the wholesaling of electricity is of no importance. After all, the elaborate credit assignment-reimbursement mechanism created by § 9(C) of the Act was specifically designed to insure that locally-consumed electricity did not incur any Energy Tax liability at the wholesale level. Even were the argument available to New Mexico, there is no *de minimis* defense to violations of the Commerce Clause.

None of the cases previously cited by the State, or relied upon by the lower court, are to the contrary. In *Alaska v. Arctic Maid*, 366 U.S. 199 (1961), the Court found that freezer ships taking salmon for canning and sale in other states were subject to a 4% tax, while local canneries paid a tax of 6%. There was no discrimination between local and interstate concerns engaging in the same economic activity. *So. Carolina Power Co. v. So. Carolina Tax Comm'n*, 52 F.2d 515 (E.D. S.C. 1931), *aff'd per curiam*, 286 U.S. 525 (1932), involved a state tax on the production and sale of electricity

<sup>13</sup> During 1975, wholesale power sales by appellants to the Public Service Company of New Mexico alone totalled 3,720,000 kwh (App. 38, 44, 55, 68).

which allowed a credit against the sales tax for any production tax previously paid. The challenge was made on a variety of bases, but the issue of discrimination was raised only by an entity that sold in South Carolina power produced in other states. The court found no discrimination against such imported power, and there was no claim made, as here, of a discrimination against exported power.

In its discussion of the discrimination question, the lower court cites only *Public Utility District No. 2 v. State*, 82 Wash.2d 232, 510 P.2d 206, *appeal dismissed*, 414 U.S. 1106 (1973), which is entirely inapposite. In that case, several Washington utilities argued that the proceeds from the sale of power to Oregon utilities had been improperly included in computation of Washington's gross income tax. In the particular sales which had been taxed, the energy had been sold at wholesale at the local utilities' switchyards in Washington, whence it was transmitted to the Oregon utility purchasers by the Bonneville Power Administration.

The tax in question permitted the utilities to deduct the proceeds from sales in interstate commerce and the proceeds from wholesale sales for resale in Washington. The court found that the latter deduction was to avoid "pyramiding" with the state's retail tax on electricity, and that it was neither arbitrary nor discriminatory to deny a similar deduction with respect to the sales in question.

The deductions permitted by the Washington tax are in no way comparable to the "credit" provisions of the Energy Tax. Initially, the purpose of the deduction allowed by the Washington tax for wholesale sales for local consumption was to avoid double taxation of the

same transaction, and not to insulate local utilities from the burden of a tax which falls entirely upon interstate commerce, which is the stated purpose of the Act's credit provisions. More significantly, a similar deduction was available for interstate sales, which is not the case with New Mexico's credit provisions. In short, there was no issue of discrimination against interstate commerce involved in the litigation.

As for the sales which had been taxed in that case, it was established that both the sale and the delivery of the power in question had taken place in Washington. Interstate commerce was not involved. *Public Utility Dist. No. 2* simply holds that a state may properly tax the sale of power which is generated, sold, and delivered within its borders. That has no bearing on the present case. The Energy Tax concededly discriminates against interstate transactions in electricity at the wholesale level.

No case has been, or can be, cited which sustains the validity of the Energy Tax. The pretense that New Mexico has simply reduced its gross receipts tax on the retail sale of electricity to 2%, while taxing all generation of electricity at 2%, is just that. The Energy Tax cannot be saved by rewriting it as a hypothetical alternative tax which may or may not survive constitutional scrutiny. The tax which New Mexico actually seeks to impose falls only upon interstate transactions, and that the Commerce Clause does not permit.

## III

### THE ELECTRICAL ENERGY TAX IMPOSES MULTIPLE BURDENS ON THE INTERSTATE TRANSMISSION AND CONSUMPTION OF ELECTRICITY.

In its decision in *Gen'l Motors Corp. v. Washington*, 377 U.S. 436 (1964), this Court identified a separate source of constitutional concern where a facially non-discriminatory state tax is applied to transactions involving interstate commerce:

Because every State has equal rights when taxing the commerce it touches, there exists the danger that such taxes can impose cumulative burdens upon interstate transactions which are not presented to local commerce. 377 U.S. at 440.

*Cf. also Standard Pressed Steel Co. v. Washington Rev. Dept.*, 419 U.S. 560 (1975); *J. D. Adams Manufacturing Co. v. Storen*, 304 U.S. 307 (1938); *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938). Where that danger becomes a reality, as here, the tax on the interstate transaction is unconstitutional.

Formalistic labels aside for the moment, the Energy Tax indisputably places an economic burden upon electricity generated within New Mexico, and that burden will be borne by that electricity until it reaches its point of consumption. Because of the credit provisions of the Act, its economic burden falls solely upon electricity transmitted for consumption in other states.

During the course of the proceedings below, it was shown that the same electricity which bears the exclusive burden of the Energy Tax becomes subject to additional taxation when it reaches the state where it is to be consumed (App. 39, 45, 56, 63, 69, 78-83). In 1975 alone, the appellant utilities paid the following

amounts in taxes, attributable to electricity generated in New Mexico, to state and local jurisdictions where that electricity was consumed:<sup>14</sup>

APS —	\$ 6,327,853
EPE —	398,638
SPR —	1,153,378
SCE —	2,299,963
TGE —	3,436,133
Total—	\$13,615,965

This showing of actual multiple taxation of electricity transmitted in interstate commerce for consumption in other states remains uncontroverted.

The lower court again avoids this issue of multiple taxation by characterizing the Energy Tax as one on the generation of electricity, which, it reasons, only occurs in New Mexico and can only be taxed by New Mexico. 576 P.2d at 296. This particular conclusion reflects the ambivalence which characterizes that court's attempt to categorize the Energy Tax in a fashion that will eliminate its constitutional infirmities. The Act's concededly discriminatory impact is defended by arguing that the tax is on the commodity of electricity, and that the State's entire taxing structure for that commodity is non-discriminatory. When this is shown to result in multiple taxation of a good transmitted in interstate commerce, the Energy Tax is defended as one on the activity of generation, which is localized and can only be taxed by New Mexico. The inconsistency is apparent.

<sup>14</sup> (App. 56, 62, 78-83.) None of these taxes allow any credits, offsets, or rebates for amounts of Energy Tax payable with respect to that power (App. 39, 45-46, 56-57, 62-63, 70).

The court's principal reliance for characterization of the Energy Tax as one on generation is upon *Utah Power & Light Co. v. Pfof*, 286 U.S. 165 (1932), in which this Court held that generation of electricity was a local activity separable from its subsequent interstate transmission. The result in *Pfof* is consistent with decisions of this Court concerning severance or production taxes in other economic areas. *Cf. Hope Natural Gas Co. v. Hall*, 274 U.S. 284 (1927) (natural gas production); *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172 (1923) (iron ore extraction); *Heisler v. Thomas Colliery Co.*, 260 U.S. 245 (1922) (anthracite coal extraction); *American Mfg. Co. v. St. Louis*, 250 U.S. 459 (1919) (manufactured goods).

*Pfof* and its antecedents establish only that a state production tax uniformly applied does not offend the Commerce Clause. In none of these "production tax" cases, however, was there any contention that the levy discriminated against interstate commerce. No prior decision has upheld, under the Commerce Clause, a production tax which applied only to goods shipped for consumption outside the taxing state; yet that is the essential feature of the tax New Mexico has imposed on electricity produced within its borders.

Perhaps more importantly, this Court has previously emphasized that, in this area, the focus of analysis must be on the practical operation of a tax, rather than on abstract formulas or legal labels by which it may be explained, characterized, or described. *Cf. Best & Co. v. Maxwell, supra*, 311 U.S. at 455-56. The Energy Tax is simply not properly classified as a production or severance tax. By its very terms, the Energy Tax is imposed not upon the generation of power, but upon "the privilege of generating electricity in this state

for the purpose of sale.” § 72-34-3, NMSA 1953 (1975 P.S.) (emphasis added). Moreover, the economic impact of the Energy Tax does not fall upon all generation of electricity for sale. In its practical operation, the Act applies only where the taxed privilege is exercised “for the purpose of sale” *outside New Mexico*.

At the point of generation, it cannot be ascertained, with any degree of certainty, whether any Energy Tax liability will attach or the amount of tax that will have to be paid. To the contrary, because of the “potential credit” recognized by the Bureau of Revenue’s own regulations, neither liability for nor the amount of the Energy Tax can be ascertained until it is determined where the generated electricity will be transmitted and consumed. The practical operation of the Act’s credit provisions delays the incidence of the Energy Tax beyond the point of production to the point of sale and consumption.<sup>15</sup>

The Act is closely analogous to the Texas tax on the occupation of “gathering gas” which this Court invalidated in *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954). That tax was measured by the volume of gas “taken,” and its incidence was held to be “on the exit of gas from the State”—a point beyond the step where production had ceased and transmission in interstate commerce had begun. The constitutional infirmity was that every state through which the line passed could impose a similar levy and “resurrect the

<sup>15</sup> In *Hope Natural Gas Co. v. Hall*, *supra*, this Court cautioned that its approval of the tax on production of natural gas might be withheld, if the measure or incidence of the tax was dependent upon events occurring after the gas entered the stream of interstate commerce. That is precisely what the Energy Tax does.

customs barriers which the Commerce Clause was designed to eliminate.” 347 U.S. at 170.

The Energy Tax carries the vice perceived in *Michigan-Wisconsin* at least one impermissible step further. In *Michigan-Wisconsin*, the tax in question purported to apply equally to gas which moved both in intrastate and interstate commerce. The Energy Tax does not make that pretense. Here, it is *only* interstate transmission and consumption of electricity that incurs any monetary liability by reason of the Energy Tax. Moreover, while the Texas tax was invalidated because it would “permit a multiple burden” upon interstate commerce, 347 U.S. at 170, here multiple state taxation of the electricity in question is not potential but real.

#### IV

#### THE ENERGY TAX EXTENDS NEW MEXICO’S TAXING POWERS BEYOND THE LIMITS PERMITTED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

In a variety of analogous contexts involving state taxation with interstate ramifications, this Court has suggested that both the Commerce Clause and the Due Process Clause of the Fourteenth Amendment independently impose a geographic limitation upon the permissible exercise of the taxing power of a state. The undisputed facts of the present case reveal a purposeful and successful effort by New Mexico to exceed that limitation.

In *Nashville, Chattanooga & St. Louis Railway v. Browning*, 310 U.S. 362 (1940), this Court considered the application of a state’s *ad valorem* property tax to the rolling stock of an interstate railroad, and held that, in applying such a tax, the state must employ a

formula that fairly estimates the amount of such property with a taxable *situs* within the state, because:

In tapping these common sources of revenue a state cannot, we have held, use a fiscal formula, whatever may be its appearance of certitude, to project the taxing power of the State plainly beyond its borders. 310 U.S. at 365.

While *Nashville, Chattanooga* was decided on the basis of the Commerce Clause, when the identical issue was once again presented, the Court indicated its view that the Due Process Clause imposed the very same limitation:

The taxation of property not located in the taxing State is constitutionally invalid, both because it imposes an illegitimate restraint on interstate commerce and because it denies to the taxpayer the process that is his due. A State will not be permitted, under the shelter of an imprecise allocation formula or by ignoring the peculiarities of a given enterprise, to "project the taxing power of the State plainly beyond its borders."

*Norfolk & Western Railway v. Missouri State Tax Comm'n*, 390 U.S. 317, 325 (1968) (quoting *Nashville, C. & St. L. R. Co. v. Browning*, *supra*).

Nor, the Court has indicated, is this a rule confined in its application to state property taxes. In *Evco v. Jones*, 409 U.S. 91 (1972), this Court invalidated the application of the New Mexico Gross Receipts Tax to a transaction that took place in another state, because "a tax levied on the gross receipts from the sales of tangible personal property in another State is an impermissible burden on commerce." 409 U.S. at 93. *Cf. also American Oil Co. v. Neill*, 380 U.S. 451 (1965); *Conn. Gen'l Life Ins. Co. v. Johnson*, 303 U.S. 77 (1938).

The economic burden of the Energy Tax falls solely and exclusively upon electricity generated in New Mexico but consumed elsewhere, while sparing locally consumed electricity from any additional tax burden. This disparate impact is neither inadvertent nor fortuitous. The legislative history makes clear that the Energy Tax was conceived, designed, and principally defended as a measure that would collect revenues solely from the residents of other states, and was carefully tailored to avoid placing any tax burden whatsoever on the residents of New Mexico.

The Act originated as S.B. 258, introduced and cosponsored by Senator Aubrey Dunn, which imposed a tax on generation of electricity at the rate of one-half mill (\$.0005) per kilowatt hour (Rec. 390, 598).<sup>16</sup> The Bureau of Revenue Bill Review Report on the measure described the impact of the proposed tax, through the use of a chart which compared the tax's projected effect on average residential electricity bills in most New Mexico cities, and in Denver, El Paso, Phoenix, Santa Monica, and Tucson. This chart indicated that, while the tax would increase electricity bills for consumers in

<sup>16</sup> The State has in the past disputed the propriety of consideration of the Act's legislative history, arguing that the Energy Tax cannot be invalidated on the basis of the legislature's motivations. (Motion, p. 20.) The argument misses the point. The legislative history of the Energy Tax merely serves to confirm that its entirely extraterritorial impact comports with the intention of the New Mexico legislature. In *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977), this Court considered statements issued by the President of the New York Stock Exchange and the Governor of New York to support its conclusions as to the discriminatory nature of the New York tax involved. 429 U.S. at 323, 327 nn. 7, 10. Quibbling over the pertinence of the Act's legislative history tacitly concedes that it has been accurately described.

other states, it would produce no such increase in charges within New Mexico (App. 75; Rec. 602, 607, 612). The chart was cited throughout the course of legislative consideration as a reason for the measure's enactment (Rec. 419, 458-59).

The first hearings were held by the Corporations Committee of the New Mexico Senate, at which time Senator Dunn introduced a Senate Corporations Committee Substitute for Senate Bill 258, which added, *inter alia*, what is now Section 9(C) of the Act (Rec. 395-400, 410). The Commissioner of Revenue was then introduced to explain the operation and effect of the bill. After describing the operation of the "credit provisions" of the bill, the Commissioner informed the Committee of his conclusion that "the customer would see no difference in his billing in New Mexico" (Rec. 448), and that "the taxpayer in California or the consumer in California would bear the brunt of the tax" (App. 72; Rec. 449).

The bill was next considered by the Senate Finance Committee on March 5, where Senator Dunn again stated that "there will be very little possibility of any of this being passed on to the New Mexico consumer" (App. 72; Rec. 456). At that hearing, however, the question was raised whether the credit provisions would always produce a "washout" of Energy Tax liability, and it was discovered that, in the case of at least one New Mexico utility (later identified as Southwestern Public Service Company), application of the credit provisions would leave some net Energy Tax liability, which might be passed on to New Mexico residents (App. 76; Rec. 487).

By the time the measure reached the floor of the Senate for debate, this problem had been cured by a

Senate Finance Committee Substitute bill, which reduced the tax rate to four-tenths of a mill (\$.0004) per kilowatt hour (Rec. 402, 608). In a memorandum to Senator Dunn, dated March 10, 1975, the Commissioner of Revenue explained the reason for, and the effect of, this change:

Under the generation tax rate of 1/2 mill per KWH, of all the utilities in New Mexico, it appeared that only Southwestern Public Service Company might have to pass some generation tax on to New Mexico consumers. It appears that the amendment to 4/10 of a mill brings down the generation tax so that even in Southwestern's case the gross receipts tax more than offsets the generation tax. (App. 76; Rec. 614.)

This Senate Finance Committee Substitute was then debated in the Senate on March 11, where Senator Dunn explained it in the following fashion:

[A]nd the idea behind it, Mr. President, is that we levy this generating tax and we allow the generating companies to take credit for the gross receipts tax which they collect on this power as they sell it, against this particular amount of generation tax. When this is done, Mr. President, it forms a washout which allows that most of the tax could be passed on in almost 99.9 per cent of the time to the residents of Arizona and California. (App. 73; Rec. 512.)

Senator Dunn further explained that the tax rate had been reduced to eliminate the one situation identified where the burden of the tax might fall on New Mexico consumers (Rec. 514-15). The bill was approved by the Senate, and the New Mexico House of Representatives thereupon took up its consideration.

The theme of the legislative history of the Act in the House was identical to that developed in the Senate. In an appearance before the House Taxation and Revenue Committee, Senator Dunn described the intent which had motivated its passage by the Senate:

Mr. Chairman, the main idea behind this is that the generator who is responsible for this tax may apply against that tax the gross receipts which he collects. Mr. Chairman, I think this is a very important part of it. And in almost one hundred per cent, but not in every case, I'd hasten to say that there would be hardly any taxation on the individual consumer in the State of New Mexico, in this particular area. (App. 73, Rec. 524.)

At a subsequent point in the course of the same hearing, Senator Dunn stressed the fact that "this particular tax was for the consumer, Mr. Chairman, for the consumer in Arizona and for the consumer in California" (App. 73; Rec. 584).

The bill was approved by the Taxation and Revenue Committee and reported to the House, where it was sponsored by Representative Lopez, who had opposed prior attempts to impose generation taxes. Representative Lopez explained his change of heart to his colleagues in the following fashion:

I find myself in the unique position this year, Mr. Speaker, of having to support a measure of this nature. As you all know, for the last four years, I've stood up in opposition to the imposition of this sort of tax. But my opposition was based on the fact that there was no way to impose the tax without placing a burden on the New Mexico taxpayer or utility user. However, this year a device has been worked out whereby there is a credit in it and the tax will be paid by out-of-state resi-

dents with no additional burden on our New Mexico residents. So, for that reason I stand before you today supporting this bill and carrying it. (App. 73-74; Rec. 588.)

*Cf. also* 122 Cong. Rec. S. 12714 (daily ed. July 28, 1976) (Rec. 753). The bill was, of course, passed by the House, and the Energy Tax became effective on July 1, 1975.

This brief description of its legislative history demonstrates that the Energy Tax was conceived and designed for the explicit purpose of deriving tax revenues from residents of other states. In every instance where the possibility was discovered that some portion of the tax burden might fall on New Mexico residents, the bill was rapidly amended to avert it. Initially, Section 9(C) was added to accommodate the local wholesaler who could not take full advantage of the Section 9(B) credit. When it was nevertheless discovered that there was one local utility that might suffer some net Energy Tax liability, the rate of tax was reduced to avoid that result. New Mexico has never seriously disputed that the Act does serve its intended purpose—it imposes a greater tax burden *only* upon electricity transmitted to and consumed in other markets. In the prophetic words of Senator Dunn, the Act's sponsor, this is a tax "for the consumer in Arizona and for the consumer in California" (App. 73; Rec. 584.)

In *Austin v. New Hampshire*, 420 U.S. 656 (1975), this Court considered the constitutionality of a "commuter income tax" imposed on the incomes of nonresidents earned in New Hampshire. While the taxing statute also purported to reach the income earned in other states by New Hampshire residents, the Court noted that certain exemptions from the tax created a

situation where "in effect, then, the State taxes only the income of nonresidents working in New Hampshire," 420 U.S. at 659, and held the tax unconstitutional.

While the decision in *Austin* was based upon the Privileges and Immunities Clause of Article IV, cl. 1, of the Constitution, that clause was viewed as one designed to preserve "the structural balance essential to the concept of federalism." 420 U.S. at 662. The Commerce and Due Process Clauses serve precisely the same concern. Moreover, the Energy Tax is at least as serious a manifestation of the states' "centrifugal tendency," 420 U.S. at 660, as was the New Hampshire "commuter tax," and equally deserving of repudiation.

The considerations underlying enactment of the Energy Tax are perhaps understandable, but nonetheless constitutionally impermissible. It is not at all surprising that a taxing body should seek to shift the burden of its revenue collections to non-constituents. Similarly, New Mexico's apparent desire to capitalize upon or preserve natural resources located within its borders by natural accident which facilitate the generation of electricity is not a novel phenomenon. *Cf. Baldwin v. Seelig*, 294 U.S. 511 (1935); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923). Preservation of the national economic structure envisioned by the Constitution requires that these essentially parochial tendencies be confined to the bounds required by our Federal system. Those bounds are clearly exceeded by the Energy Tax.

## V

### THE ACT INTERFERES WITH THE CONSTITUTIONAL POLICIES PROTECTED BY THE IMPORT-EXPORT CLAUSE.

While the limitations imposed by the Commerce Clause upon the states' power to tax are qualified in

nature, that is not the case under the Import-Export Clause (Art. I, Section 10). "By its own terms, the prohibition on taxation contained in the Import-Export Clause is absolute . . ." *Kosydar v. Nat'l Cash Register Co.*, 417 U.S. 62, 65 (1974). *Cf. also Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69 (1946). The analysis required to determine in what circumstances this absolute ban on state taxation is to be applied, however, has undergone a significant transformation in recent years.

Prior to the decision of this Court in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), the crux of the constitutional inquiry was whether particular goods or commodities subjected to the challenged tax were in fact imports or exports. With respect to imports, the "original package" doctrine of *Brown v. Maryland*, 12 Wheat. 419 (1827), prevailed, which held that an imported good retained its status as such so long as it remained in its original imported package. *Cf. also Dept. of Revenue v. Beam Distilling Co.*, 377 U.S. 341 (1964). Where an alleged tax on exports was involved, the inquiry was whether the goods taxed had commenced their final, continuous journey to a foreign destination. *Kosydar v. Nat'l Cash Register, supra*.

In *Michelin Tire Corp. v. Wages*, this Court rejected the "original package" doctrine with respect to imports and sustained a nondiscriminatory state *ad valorem* property tax as applied to imported inventories. In the process, the Court indicated that future inquiry would not be concerned with classifying taxed goods as imports or exports, but with determining whether the tax levied was an "Impost or Duty." This latter inquiry was to be answered by consideration of the poten-

tial impact of a state tax upon the three policy considerations which the Clause serves:

1) Preserving the ability of the federal government to exclusively and uniformly regulate commercial relations with foreign governments.

2) Preserving the integrity of import revenues as a source of funds for the federal government.

3) Prevention of the interstate friction and rivalry that might ensue were the coastal states (or other states with ports of entry) permitted to take advantage of favorable geographical locations and enact protective tariffs.

The scope of the analysis required where exports were claimed to be improperly taxed was further clarified in *Dep't of Revenue v. Assoc. of Wash. Stevedoring Companies*, — U.S. —, 98 S.Ct. 1388 (1978), where this Court held that the Clause was not offended by the application of a state business and occupation tax to stevedoring operations. The Court noted that, where exports were involved, the second of the policy considerations identified in *Michelin* (the preservation of federal revenues) was inapplicable, for "the Constitution forbids federal taxation of exports." 98 S.Ct. at 1403. The Court concluded that "any tax relating to exports can be tested for its conformance with the first and third policies." *Ibid.*

Where a state tax on exports is involved, the body of constitutional doctrine to be consulted must be viewed as evolving in every sense of the word. There has not been opportunity for this Court to expand upon the process of analysis commenced in *Wash. Stevedoring Companies*. It is significant, however, that in both *Michelin* and *Wash. Stevedoring Companies*, the Court expressly declined to express its views as to the pro-

priety, under the Import-Export Clause, of a state tax on goods in transit to a foreign country. That is precisely the issue presented here. At least one of the appellant utilities generates electricity in New Mexico for sale and consumption in the Republic of Mexico (App. 25, 48, 50). The statutory incidence of the Energy Tax is on the generation of electricity *for sale*, and its actual economic incidence is governed by its point of eventual consumption. In either event, New Mexico has delayed the imposition of its Energy Tax to a point beyond where production has ceased and the process of interstate transmission has begun. With respect to the electricity transmitted to and consumed in Mexico, the Energy Tax is in a very real sense imposed upon a good in transit to that foreign nation. Analysis reveals that the Energy Tax quite clearly impacts upon the policies fostered by the Import-Export Clause.

In *Michelin*, this Court found that the Georgia property tax there involved would not impinge on the Federal government's governance of commercial affairs with foreign countries because it did not "fall upon imports as such because of their place of origin." 423 U.S. at 286. Quite the opposite is true here. To the extent the Energy Tax falls upon electricity transmitted for consumption in Mexico, it does so because of that electricity's place of destination. In *Michelin*, all the property taxed was located, at the time the tax was imposed, within the State of Georgia. In *Wash. Stevedoring*, all the services taxed were performed in the State of Washington. In both settings, that fact reduced the possible disruption of foreign commercial affairs to an acceptable constitutional minimum, and the policy considerations involved were not disturbed. Those policies would clearly be undermined, however,

by permitting states to selectively impose taxes on goods in transit to foreign markets, from which locally-consumed goods are effectively exempt.

With respect to the remaining consideration, the inquiry required is essentially identical to that under the Commerce Clause. As the Court noted, "the desire to prevent interstate rivalry and friction does not vary significantly from the primary purpose of the Commerce Clause." *Wash. Stevedoring, supra*, 98 S.Ct. at 1401. That desire is frustrated where one state is permitted to impose a tax on goods produced within its borders which is only levied if the goods are transported to a sister state or foreign nation.

In *Wash. Stevedoring*, the Court identified four independently applicable safeguards which would vindicate the policy of preserving interstate harmony: "Fair taxation will be assured by *the prohibition on discrimination* and the requirements of apportionment, nexus, and reasonable relationship between tax and benefits." *Id.*, 98 S.Ct. at 1405 (emphasis added). The Energy Tax quite obviously cannot meet the initial portion of this test. As has been explained earlier, the Energy Tax, whether viewed in isolation or as part of New Mexico's total tax structure with respect to electricity, imposes a discriminatory burden upon electricity transmitted outside New Mexico for consumption, and that violates the principal requirement established by this Court for a permissible tax.

To summarize, the Energy Tax does fall upon goods destined for consumption in a foreign nation, and does so precisely because of that foreign destination. Were the electricity to be consumed in New Mexico, as has been shown, the burden of the Energy Tax would be wholly and automatically lifted. New Mexico's taxing

scheme imposes a discriminatory burden on electricity generated in New Mexico, but transmitted to the Republic of Mexico for consumption. To that extent, the Energy Tax represents an Impost or Duty proscribed by the Import-Export Clause.

### CONCLUSION

In upholding the Energy Tax, the New Mexico Supreme Court has sustained the principle that a state may validly impose an excise upon the exit from its borders, for sale and consumption in other states, of products locally produced. That unprecedented, and erroneous, proposition has been enunciated, moreover, in the face of an explicit Congressional prohibition against imposition of the Energy Tax and other state taxes of similar import and design. For the reasons stated above, this Court should declare New Mexico's Electrical Energy Tax void and unconstitutional, and vacate the lower court's opinion.

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# **APPENDIX**

**APPENDIX I****Provisions of United States Constitution Involved**

Article I, Section 8, clause 3 (the "Commerce Clause"):  
[The Congress shall have Power] to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Article I, Section 10 (the "Import-Export Clause"):  
... No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws:...

Article VI, clause 2 (the "Supremacy Clause"):  
This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment XIV, Section 1 (the "Due Process Clause"):  
All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**APPENDIX II**  
**The Electrical Energy Tax Act**

**CHAPTER 263**

**AN ACT**

**RELATING TO TAXATION; IMPOSING A TAX ON THE GENERATION OF ELECTRICITY; AMENDING SECTIONS 45-4-28 and 72-13-24 NMSA 1953 (BEING LAWS 1939, CHAPTER 47, SECTION 28 AND LAWS 1965, CHAPTER 248, SECTION 12, AS AMENDED); ENACTING A NEW SECTION 72-16A-16.1 NMSA 1953. BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:**

Section 1. *Short Title.* Sections 1 through 6 of this act may be cited as the "Electrical Energy Tax Act." [§ 73-34-1, NMSA 1953 (1975 P.S.)]

Section 2. *Definitions.* As used in the Electrical Energy Tax Act:

- A. "bureau" means the New Mexico bureau of revenue;
- B. "generation" includes manufacture and production;
- C. "electricity" includes electrical energy and electrical power;
- D. "person" means any individual, estate, trust, receiver, cooperative association, electric cooperative, club, corporation, company, firm partnership, joint venture, syndicate, association, irrigation district, electrical irrigation district and any utility owned or operated by a county or municipality, and also means to the extent permitted by law, any federal, state or other governmental unit or subdivision or an agency, department or instrumentality; and
- E. "sale" means selling or transferring to any person for consumption, use or resale and includes barter and exchange. [§ 72-34-2, NMSA 1953 (1975 P.S.)]

Section 3. *Imposition of Tax-Rate-Denomination As Electrical Energy Tax.*

A. For the privilege of generating electricity in this state for the purpose of sale, whether the sale takes place in this state or outside this state, there is imposed on any person generating electricity a temporary tax, applicable until July 1, 1984, of four-tenths of one mill (\$.0004) on each net kilowatt hour of electricity generated in New Mexico.

B. The tax imposed by this section shall be referred to as the "electrical energy tax." [§ 72-34-3, NMSA 1953 (1975 P.S.)]

Section 4. *Measurement and Recording of Kilowatt Hours of Electricity.* Persons subject to the imposition of the electrical energy tax shall maintain accurate measuring devices and records to measure and record the daily and cumulative monthly and yearly totals of kilowatt hours of electricity generated or distributed in this state. [§ 72-34-4, NMSA 1953 (1975 P.S.)]

Section 5. *Reports-Remittances.* Every person subject to the imposition of the electrical energy tax shall file a return on forms provided by and with the information required by the bureau and shall pay the tax due on or before the twenty-fifth day of the second month following the month in which the taxable event occurs. [§ 72-34-5, NMSA 1953 (1975 P.S.)]

Section 6. *Relief From Other Taxes.* Unless otherwise specified by statute the imposition of the electrical energy tax shall not act to relieve any person or activity from any other tax levied by the State of New Mexico or its political subdivisions. [§ 72-34-6, NMSA 1953 (1975 P.S.)]

Section 7. Section 45-4-28 NMSA 1953 (being Laws 1939, Chapter 47, Section 28, as amended) is amended to read:

"45-4-28. *Taxation.* Cooperative and foreign corporations, transacting business in this state pursuant to the

provisions of Section 45-4-1 through 45-4-32 NMSA 1953 shall pay annually, on or before July 1, to the state corporation commission, a tax of ten dollars (\$10.00) for each one hundred persons or fraction thereof to whom electricity is supplied within this state which tax shall be in lieu of all other taxes except those provided in the Gross Receipts and Compensating Tax Act, and the Electrical Energy Tax Act; provided, however, that in the event a contract has been entered into by a rural electric cooperative and a power consumer prior to February 1, 1961, and such contract does not contain an escalator clause providing for an increase for added tax liability on the cooperative, then the sale to such power consumer shall be exempt until the expiration, extension or renewal of the contract."

Section 8. Section 72-12-24 NMSA 1953 (being Laws 1965, Chapter 248, Section 12, as amended) is amended to read:

*"72-13-24. Receipts—Disbursements-Distribution.*

A. All money received by the bureau shall be deposited with the state treasurer before the close of the next succeeding business day after receipt of the money.

B. Money received or disbursed by the bureau shall be accounted for by the commissioner as required by law or regulation of the director of the department of finance and administration.

C. Disbursements for tax credits, refunds and the payment of interest shall be made by the department of finance and administration upon request and certification of their appropriateness by the commissioner or his delegate. The state treasurer shall create a suspense fund for the purpose of making the disbursements authorized by the Tax Administration Act. All revenues collected pursuant to the provisions of Sections 72-15-1 through 72-15-37 NMSA 1953, the Income Tax Act, the Withholding Tax Act, the Gross Receipts and Compensating Tax Act and the Electrical Energy Tax Act shall be credited to this suspense fund and are appropriated for the purpose of making dis-

bursements for tax credits, refunds and the payment of interest.

D. On the last day of each month, any money remaining in the suspense fund after the necessary disbursements have been made shall be identified by tax source and transferred from the suspense fund, one-half of the receipts attributable to the electrical energy tax shall be transferred to the "electrical energy fund," hereby created, and the remainder to the state general fund, except that before the remaining money is transferred to the general fund, an amount equal to one percent of the taxable gross receipts reported for the month of deposit:

(1) for each municipality shall be distributed to each municipality; and

(2) by taxpayers who have business locations on an Indian reservation or pueblo grant in an area which is contiguous to a municipality and in which the municipality performs services pursuant to a contract between the municipality and the Indian tribe or Indian pueblo shall be distributed to the municipality if:

(a) the contract describes the area in which the municipality is required to perform services and requires the municipality to perform services that are substantially the same as the services the municipality performs for itself; and

(b) the governing body of the municipality has submitted a copy of the contract to the commissioner of revenue.

E. Disbursements to cover expenditures of the bureau shall be made only upon approval of the commissioner or his delegate.

F. Miscellaneous receipts from charges made by the bureau to defray expenses pursuant to the provisions of Section 72-13-23 and 72-13-39 NMSA 1953 and similar charges are appropriated to the bureau for its use."

Section 9. A new Section 72-16A-16.1 NMSA 1953 is enacted to read:

**"72-16A-16.1. Credit-Gross Receipts Tax.**

A. If on electricity generated outside this state and consumed in this state, an electrical energy tax or similar tax on such generation has been levied by another state or political subdivisions thereof, the amount of such tax paid may be credited against the gross receipts tax due this state.

B. On electricity generated inside this state and consumed in this state which was subject to the electrical energy tax, the amount of such tax paid may be credited against the gross receipts tax due this state.

C. The credit under Subsections A or B of this section shall be assigned to the person selling the electricity for consumption in New Mexico on which New Mexico gross receipts tax is due, and the assignee shall reimburse the assignor for the credit."

Section 10. *Legislative Intent.* It is the intent of the legislature that this entire 1975 act be considered not severable, and should any part hereof be declared unconstitutional, the entire act should be declared void. [not codified]

Section 11. *Effective Date.* The effective date of the provisions of this act is July 1, 1975. [not codified]

**APPENDIX III**

**G.R. REGULATION 16.1:1—CREDIT OF ELECTRICAL ENERGY TAX ON ELECTRICITY GENERATED IN NEW MEXICO AGAINST GROSS RECEIPTS TAX—**

A. For purposes of the credit against gross receipts tax, "consumption or consumed" also includes that quantity of electricity lost through the transmission and distribution process which occurs in New Mexico.

B. Section 72-16A-16.1(C) requires that a potential credit be assigned to persons purchasing electricity for resale:

1) to buyers who will potentially consume or use the electricity in New Mexico, or

2) to buyers who will potentially resell the electricity for consumption in New Mexico;

on which an electrical energy tax or similar tax has been levied by New Mexico, by another state or by political subdivision thereof and paid by the seller.

Each seller of electricity as described in this paragraph must assign, to each buyer described in subparagraphs (1) and (2) of this paragraph, a pro rata share of the total available potential credit provided in Section 72-16A-16.1 (A) or (B).

C. It shall be presumed that the potential credit against gross receipts tax as provided by Section 72-16A-16.1(C) shall have been assigned when the buyer is in receipt of an invoice from the seller separately stating the amount of the applicable Electrical Energy Tax or similar tax as provided in Section 72-16A-16.1.

In the absence of bad faith, a wholesale purchaser in New Mexico of electricity may rely upon such an invoice in claiming a credit under Section 72-16A-16.1.

## D.

1) That portion of the potential credit assigned to a buyer further reselling the electricity for consumption in New Mexico may be credited by the assignee against the gross receipts tax due New Mexico on receipts from the sale of electricity for any month subsequent to July 1, 1975.

2) That portion of the potential credit assigned to a buyer further reselling the electricity at wholesale to buyers who will resell the electricity for consumption in New Mexico must be reassigned to the subsequent buyer as provided in paragraph B of this regulation.

3) That amount of electrical energy tax credit which is not assigned to appropriate buyers and which is otherwise creditable under Section 72-16A-16.1, may be credited against gross receipts tax due New Mexico on receipts from the sale of electricity for any reporting month subsequent to July 1, 1975.

E. To be allowable the credit must be claimed within the period provided in Section 72-13-40(B). Reflecting a credit on the taxpayer's CRS-1 return or attachment thereto will be treated as a claim for credit.